

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 259

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

AN ACT

RELATING TO THE ENVIRONMENT; PROVIDING FOR A PRIVATE RIGHT OF ACTION TO ENFORCE CERTAIN STATUTES; ENACTING NEW SECTIONS OF THE OIL AND GAS ACT, THE ENVIRONMENTAL IMPROVEMENT ACT AND THE WATER QUALITY ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of the Oil and Gas Act is enacted to read:

"[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

A. Except as provided in Subsection B of this section, a person who is injured in fact, economically or otherwise, or who is imminently threatened with injury, economically or otherwise, may commence a civil action on the person's own behalf against:

(1) any other person, including the state of

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underscored material = new
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1 New Mexico, a political subdivision thereof or any officer or
2 agency of either, charging a violation of the Oil and Gas Act
3 or a rule, permit or order issued pursuant to that act; or

4 (2) the commission or the oil conservation
5 division of the energy, minerals and natural resources
6 department alleging a failure to perform any substantive and
7 nondiscretionary act or duty required by a provision of the Oil
8 and Gas Act or a rule promulgated pursuant to that act.

9 B. No action may be commenced under Subsection A of
10 this section:

11 (1) unless the alleged violation or alleged
12 failure to perform a substantive and nondiscretionary act or
13 duty relates to a statute, rule, permit or order primarily
14 concerned with environmental protection, including, but not
15 limited to, statutes, rules, permits or orders concerned with:

- 16 (a) pits, closed-loop systems, below-
17 grade tanks and sumps;
18 (b) plugging and abandonment of wells;
19 (c) remediation;
20 (d) produced water;
21 (e) waste disposal; or
22 (f) surface waste management facilities;

23 (2) unless the plaintiff has given sixty days'
24 written notice of the violation to the commission, the
25 division, the attorney general and any alleged violator of the

1 Oil and Gas Act, rule, permit or order. However, where the
2 violation of the statute, rule, permit or order complained of
3 constitutes an immediate threat to the health or safety of the
4 plaintiff or would immediately and irreversibly impair a legal
5 interest of the plaintiff, an action under this section may be
6 brought immediately after notification of the proper parties;
7 or

8 (3) if the commission or division has
9 commenced and is diligently prosecuting a civil action in a
10 court of this state or an administrative enforcement proceeding
11 to require compliance with the Oil and Gas Act, rule, permit or
12 order. In an administrative or court action commenced by the
13 commission or division, a person who has standing pursuant to
14 Subsection A of this section and who has provided notice
15 pursuant to Paragraph (2) of this subsection prior to the
16 initiation of the action may intervene as a matter of right.

17 C. Whenever any action is brought under this
18 section, the plaintiff shall serve a copy of the complaint on
19 the commission and the division. No stipulated judgment shall
20 be entered in an action brought under this section if the
21 commission or division is not a party, unless the judgment is
22 entered at least forty-five days after the receipt of a copy of
23 the proposed stipulated judgment by the commission or division,
24 during which time the commission or division may submit
25 comments on the proposed stipulated judgment to the court or

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1 may intervene in the action as a matter of right. The
2 plaintiff in the action shall be responsible for providing the
3 proposed stipulated judgment to the commission and the
4 division.

5 D. In any action brought pursuant to this section,
6 the court may award reasonable attorney fees, except that, in
7 an action against the commission or division, no attorney fees
8 shall be awarded against the commission or division.

9 E. Except as otherwise provided in Subsection F of
10 this section, any civil penalties assessed shall be deposited
11 in the same fund in which they would be deposited if the action
12 had been brought by the commission or division.

13 F. Notwithstanding the provisions of Subsection E
14 of this section, the court shall have discretion to order that
15 any civil penalties assessed, not to exceed twenty-five
16 thousand dollars (\$25,000), be used in beneficial mitigation
17 projects that are consistent with the Oil and Gas Act or the
18 rule, permit or order alleged to have been violated and that
19 enhance the public health or the environment. Before
20 exercising this discretion, the court shall obtain written
21 comments on beneficial mitigation projects from the commission
22 or division."

23 Section 2. A new section of the Environmental Improvement
24 Act is enacted to read:

25 "[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

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1 A. Except as provided in Subsection B of this
2 section, a person who is injured in fact, economically or
3 otherwise, or who is imminently threatened with injury,
4 economically or otherwise, may commence a civil action on the
5 person's own behalf against:

6 (1) any other person, including the state of
7 New Mexico, a political subdivision thereof or any officer or
8 agency of either, charging a violation of any statute, rule or
9 permit the enforcement of which is delegated to the department,
10 or any order of the board or the secretary issued pursuant to a
11 statute or rule; or

12 (2) the department or the board alleging a
13 failure to perform any substantive and nondiscretionary act or
14 duty required by an act or rule the enforcement of which is
15 delegated to the department or board.

16 B. No action may be commenced under Subsection A of
17 this section:

18 (1) unless the plaintiff has given sixty days'
19 written notice of the violation to the secretary, the attorney
20 general and any alleged violator of the statute, rule, permit
21 or order. However, where the violation of the statute, rule,
22 permit or order complained of constitutes an immediate threat
23 to the health or safety of the plaintiff or would immediately
24 and irreversibly impair a legal interest of the plaintiff, an
25 action under this section may be brought immediately after

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1 notification of the proper parties; or

2 (2) if the department has commenced and is
3 diligently prosecuting a civil action in a court of this state
4 or an administrative enforcement proceeding to require
5 compliance with the act, rule, permit or order. In an
6 administrative or court action commenced by the department, a
7 person who has standing pursuant to Subsection A of this
8 section and who has provided notice pursuant to Paragraph (1)
9 of this subsection prior to the initiation of the action may
10 intervene as a matter of right.

11 C. Whenever any action is brought under this
12 section, the plaintiff shall serve a copy of the complaint on
13 the secretary. No stipulated judgment shall be entered in an
14 action brought under this section if the department is not a
15 party, unless the judgment is entered at least forty-five days
16 after the receipt of a copy of the proposed stipulated judgment
17 by the secretary, during which time the department may submit
18 comments on the proposed stipulated judgment to the court or
19 may intervene in the action as a matter of right. The
20 plaintiff in the action shall be responsible for providing the
21 proposed stipulated judgment to the secretary.

22 D. In any action brought pursuant to this section,
23 the court may award reasonable attorney fees, except that, in
24 an action against the department or the board, no attorney fees
25 shall be awarded against the department or the board.

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1 E. Except as otherwise provided in Subsection F of
2 this section, any civil penalties assessed shall be deposited
3 in the same fund in which they would be deposited if the action
4 had been brought by the department.

5 F. Notwithstanding the provisions of Subsection E
6 of this section, the court shall have discretion to order that
7 any civil penalties assessed, not to exceed twenty-five
8 thousand dollars (\$25,000), be used in beneficial mitigation
9 projects that are consistent with the act, rule, permit or
10 order alleged to have been violated and that enhance the public
11 health or the environment. Before exercising this discretion,
12 the court shall obtain written comments on beneficial
13 mitigation projects from the secretary.

14 G. In an action brought pursuant to this section to
15 enforce a provision of the Air Quality Control Act or a rule,
16 permit or order issued under that act, if jurisdiction to
17 enforce the act has been assumed by a local authority and if
18 the complaint arose within the jurisdiction of the local
19 authority, then, notwithstanding the definitions in Section
20 74-1-3 NMSA 1978, as used in this section:

21 (1) "board" means the local board created by
22 the local authority;

23 (2) "department" means the administrative
24 agency established by the local authority pursuant to Paragraph
25 (2) of Subsection A of Section 74-2-4 NMSA 1978; and

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1 (3) "secretary" means the director or
2 administrative head of the local agency."

3 Section 3. A new section of the Water Quality Act is
4 enacted to read:

5 "[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

6 A. Except as provided in Subsection B of this
7 section, a person who is injured in fact, economically or
8 otherwise, or who is imminently threatened with injury,
9 economically or otherwise, may commence a civil action on the
10 person's own behalf against:

11 (1) any other person, including the state of
12 New Mexico, a political subdivision thereof or any officer or
13 agency of either, charging a violation of the Water Quality Act
14 or a rule, permit or order issued pursuant to that act; or

15 (2) the commission or a constituent agency
16 alleging a failure to perform any substantive and
17 nondiscretionary act or duty required by the Water Quality Act
18 or a rule promulgated pursuant to that act.

19 B. No action may be commenced under Subsection A of
20 this section:

21 (1) unless the plaintiff has given sixty days'
22 written notice of the violation to the commission, the
23 appropriate constituent agency, the attorney general and any
24 alleged violator of the act, rule, permit or order. However,
25 where the violation of the act, rule, permit or order

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1 complained of constitutes an immediate threat to the health or
2 safety of the plaintiff or would immediately and irreversibly
3 impair a legal interest of the plaintiff, an action under this
4 section may be brought immediately after notification of the
5 proper parties; or

6 (2) if a constituent agency has commenced and
7 is diligently prosecuting a civil action in a court of this
8 state or an administrative enforcement proceeding to require
9 compliance with the act, rule, permit or order. In an
10 administrative or court action commenced by a constituent
11 agency, a person who has standing pursuant to Subsection A of
12 this section and who has provided notice pursuant to Paragraph
13 (1) of this subsection prior to the initiation of the action
14 may intervene as a matter of right.

15 C. Whenever any action is brought under this
16 section, the plaintiff shall serve a copy of the complaint on
17 the commission and the appropriate constituent agency. No
18 stipulated judgment shall be entered in an action brought under
19 this section if the appropriate constituent agency is not a
20 party, unless the judgment is entered at least forty-five days
21 after the receipt of a copy of the proposed stipulated judgment
22 by the agency, during which time the agency may submit comments
23 on the proposed stipulated judgment to the court or may
24 intervene in the action as a matter of right. The plaintiff in
25 the action shall be responsible for providing the proposed

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1 stipulated judgment to the agency.

2 D. In any action brought pursuant to this section,
3 the court may award reasonable attorney fees, except that, in
4 an action against the commission or a constituent agency, no
5 attorney fees shall be awarded against the commission or
6 constituent agency.

7 E. Except as otherwise provided in Subsection F of
8 this section, any civil penalties assessed shall be deposited
9 in the same fund in which they would be deposited if the action
10 had been brought by the appropriate constituent agency.

11 F. Notwithstanding the provisions of Subsection E
12 of this section, the court shall have discretion to order that
13 any civil penalties assessed, not to exceed twenty-five
14 thousand dollars (\$25,000), be used in beneficial mitigation
15 projects that are consistent with the Water Quality Act or the
16 rule, permit or order alleged to have been violated and that
17 enhance the public health or the environment. Before
18 exercising this discretion, the court shall obtain written
19 comments on beneficial mitigation projects from the appropriate
20 constituent agency."

21 Section 4. EFFECTIVE DATE.--The effective date of the
22 provisions of this act is July 1, 2010.